IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
October 24, 2007 Session

JESSICA L. SMITH, ET AL. v. STATE OF TENNESSEE

Appeal from the Claims Commission for the State of Tennessee
No. 20301518 William O. Shults, Commissioner

No. E2007-00809-COA-R3-CV - FILED MARCH 17, 2008

In November of 2002, Ms. Jessica Smith was savagely beaten on the head with a brick after she exited the Lake Avenue Parking Garage on the University of Tennessee campus on her way to her dorm. Ms. Smith and her parents brought this lawsuit against the University of Tennessee pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(C), claiming that the University negligently created or maintained a dangerous condition on state controlled real property. Following a trial, the Claims Commission determined that due to improper lighting at the site of the attack, the State was liable pursuant to that statutory provision. The State requested and was granted an en banc review by the full Claims Commission. Following the en banc review, a majority of the Commissioners affirmed the judgment in favor of Ms. Smith. The State appeals. We conclude that the evidence does not preponderate against the Commission's findings and ultimate conclusions that, among others, the State negligently created or maintained a dangerous condition on state controlled real property, that the attack on Ms. Smith was foreseeable, and that the State had adequate notice of the dangerous condition. We, therefore, affirm the en banc majority decision of the Claims Commission.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Claims Commission Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Peter M. Foley, Deputy General Counsel, for the Appellant, The University of Tennessee.

William B. Luther, Panama City Beach, Florida, for the Appellees Jessica Smith, Gary Smith, and Jane Smith.

OPINION

Background

The tragic facts underlying this lawsuit took place on November 13, 2002. On that day, at approximately 10:30 p.m., Jessica Smith, an 18 year old freshman at the University of Tennessee in Knoxville, was returning to the campus from her off-campus job. Ms. Smith parked her car in the Lake Avenue Parking Garage (the "Parking Garage") and proceeded to exit that garage. Ms. Smith then walked in a westerly direction on Terrace Avenue toward her dorm, South Carrick Hall. A set of steps located on Terrace Avenue lead to Caledonia Avenue. These steps are roughly three hundred feet from the Parking Garage. When Ms. Smith reached the bottom of the steps, she was viciously attacked by Christopher Jesse Gann ("Gann"). Gann had no apparent connection to the University. Ms. Smith was standing under two high pressure overhead lamps when she first was attacked by Gann, who apparently was attempting to take Smith's car keys and steal her car. Gann struck Ms. Smith on the head with a brick. After the initial attack, Smith fled up the steps and eventually ran behind the Music Building Annex. Gann continued to pursue Ms. Smith and hit her on the head with the brick several more times. Smith was found behind the Music Building Annex. As a result of the vicious attack, Smith suffered numerous and severe permanent physical injuries, including permanent brain damage.

This lawsuit was filed by Ms. Smith and her parents (collectively referred to as "Plaintiffs"). Plaintiffs filed suit in the Claims Commission against the State and the University of Tennessee. In the complaint, as amended, and as relevant to this appeal, Plaintiffs claimed:

> [T]he inadequacies, and dangerous conditions created by the State upon State controlled property as set out in the previous paragraphs of this Complaint and the defendant's failure to take the necessary protective steps in face of these inadequacies and shortcomings amounted to negligence on the part of the defendants, which include providing of necessary police protection and/or precautions given the circumstances as set out …, [b]y virtue of which it was foreseeable by the State that this negligence would be the proximate cause of the injury.…
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> The plaintiffs aver that they are entitled to recover from the defendants under TCA § 9-8-307(a)(1)(C) which provides the waiver of immunity for "negligently created or maintained dangerous conditions on State controlled real property" ….

The State[1] filed a motion to dismiss and/or motion for summary judgment, claiming it was immune from the cause of action asserted in the complaint. According to the State:

> The only … jurisdictional basis claimed by Claimants is T.C.A. § 9-8-307(a)(1)(C) which provides jurisdiction for:
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> > negligently created or maintained dangerous conditions on state-controlled real property. The claimant under this subsection must establish the foreseeability of the risks and notice given to the proper state officials at a time sufficiently prior to the injury for the State to have taken appropriate measures.
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> An exhaustive review of Tennessee case law shows that this provision has been asserted as a jurisdictional bases in eighteen appellate decisions. In all of those decisions, however, the claimant was complaining of some condition inherent in the real property itself (which is not claimed here).… Claimants make no allegation about anything that is affixed to or part of any State-controlled real property. Accordingly, there is no basis under this subsection of T.C.A. § 9-8-307, or any other subsection, which would provide a jurisdictional basis (and a waiver of sovereign immunity) such as to allow this claim to go forward.

The Commissioner denied the State's motion, concluding that after a review of the record as a whole, the "evidence as it exists cannot support a finding that a reasonable person may review the facts of this case and reach only one conclusion in accordance with the *McCall [v. Wilder*, 913 S.W.2d 150 (Tenn. 1995)] standard." However, the Commissioner added that the State could renew its motion at a later time as the proof developed. Following a second unsuccessful attempt by the State at having the case dismissed on summary judgment, a four day trial took place in July of 2005.

Following the trial, the Commissioner entered a judgment in favor of Ms. Smith for the jurisdictional maximum amount of $300,000. The basis for the Commissioner's finding of liability was Tenn. Code Ann. § 9-8-307(a)(1)(C). Specifically, the Commissioner concluded that

[1] Although Plaintiffs originally sued the State and the University of Tennessee, since the University is an arm of the State, we will collectively refer to the defendants as "the State."

the State had created a dangerous condition on state controlled real property due to inadequate lighting at the site of the attack.[2] According to the Commissioner:

> The lighting is sufficient if one is right by the light. If one is outside the scope of the light, there's darkness. There's darkness where somebody can disappear. There's darkness where somebody can hide.
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> * * *
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> [The Claimant] was walking along the properly lit area. The problem was that those lights – and for the Court of Appeals, when they hear this, I'm telling you, look at the pictures. It's amazing to see how light is concentrated right in one location as that lamp is, and then it just drops off into darkness. The light must be broader. They have to cast more light.

The Commissioner further concluded that based on the facts presented at trial, the attack on Ms. Smith was reasonably foreseeable. Although the Commissioner found Ms. Smith 25% responsible for her own injuries under comparative fault principles, the extent of Ms. Smith's damages were so significant that the State was found liable for the jurisdictional maximum of $300,000, even when the amount of the judgment was reduced for comparative fault purposes.

The State requested and was granted an en banc review of the individual Commissioner's decision.[3] In March of 2007, the en banc decision of the Claims Commission was filed. Commissioner Shults authored the majority opinion in which Commissioner Miller-Herron concurred. Commissioner Reevers filed a dissenting opinion. The majority opinion is quite thorough, comprising thirty-six pages.[4] The primary issues before the en banc Commission were whether Plaintiffs had established that there was a negligently created or maintained dangerous condition state controlled real property and, if so: (1) whether the risk of harm to Ms. Smith was foreseeable; and (2) whether the State had adequate notice of the dangerous condition. Other issues

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[2] Plaintiffs claimed several other things contributed to the dangerous condition of the property where Ms. Smith was attacked, such as overgrown bushes which enabled potential attackers to hide. The Commissioner specifically rejected Plaintiffs' claims as to these other various conditions and determined that the only dangerous condition was the inadequate lighting. We will, therefore, limit our discussion of the facts to that particular "dangerous condition."

[3] The Commissioner who issued the initial decision was Commissioner Vance W. Cheek, Jr. Commissioner Cheek resigned in March of 2006 to run for Congress. Commissioner William O. Shults was appointed to fill the vacancy.

[4] Pursuant to Tenn. Comp. R. & Regs. ch. 0310-1-1-.03(5) (1992), the standard of review used by the Commission in an en banc hearing "is de novo with no presumption of correctness of the decision of the individual Commissioner." The order entered by the Commission granting the en banc review stated that the review "will be limited to argument on the law and argument in general." Accordingly, no further proof was taken at the en banc hearing.

included whether the State owed a duty to Ms. Smith, whether that duty had been breached, and whether the breach of that duty was a proximate cause of her injuries. The Commission majority answered each of these issues in the affirmative.

As to the first issue, the Commission correctly concluded that the steps where Ms. Smith was attacked were on University property and the overhead lights at the site of the attack were maintained by University personnel, two facts not in dispute. The en banc Commission also agreed with and affirmed the findings of Commissioner Cheek that the lighting was inadequate and created a dangerous condition. As to the foreseeability issue, the Commission concluded that the number and type of crimes in the general vicinity of the attack and the Parking Garage were such that the attack on Ms. Smith was foreseeable. The Commission then concluded that because the lights at the site of the attack were maintained by the University, the University must be charged "with actual notice of the lighting condition there." After reviewing the various elements necessary to establish a negligence claim, the Commission determined that the State owed Ms. Smith a duty of reasonable care, that the State breached that duty, and that this breach was a proximate cause of Ms. Smith's injuries.

The State appeals, raising the following issues, which we quote from their brief:

1. Was any dangerous condition on State controlled real property pled or established so as to invoke the jurisdiction of the Tennessee Claims Commission?

2. Did Claimants establish that a dangerous condition on State controlled real property was a proximate cause of the injury to Jessica Smith?

3. Did the Claimants establish foreseeability of the risk and notice to the proper State officials prior to the injury, as required by Tenn. Code Ann. § 9-8-307(a)(1)(C)?

Discussion

This Court recently set forth the applicable standard of review on appeals from decisions of the Claims Commission sitting en banc. We stated:

> Appeals from decisions by the Commission sitting en banc are governed by the Tennessee Rules of Appellate Procedure. Tenn. Code Ann. § 9-8-403(a)(1) (Supp. 2005). Accordingly, because the Claims Commission hears cases without a jury, this court reviews the Commission's factual findings and legal conclusions using the now familiar standard in Tenn. R. App. P. 13(d). Thus, we will review the Commission's findings of fact de novo with a presumption that they

> are correct unless the evidence preponderates otherwise. *Beare Co. v. State*, 814 S.W.2d 715, 717 (Tenn. 1991); *Dobson v. State*, 23 S.W.3d 324, 328-29 (Tenn. Ct. App. 1999); *Sanders v. State*, 783 S.W.2d 948, 951 (Tenn. Ct. App. 1989). The Commission's legal conclusions, however, have no similar presumption of correctness. *Turner v. State*, 184 S.W.3d 701 (Tenn. Ct. App. 2005), *perm. app. denied* (Tenn. Oct. 24, 2005); *Crew One Productions, Inc. v. State*, 149 S.W.3d 89, 92 (Tenn. Ct. App. 2004); *Belcher v. State*, No. E2003-00642-COA-R3-CV, 2003 WL 22794479, at *4 (Tenn. Ct. App. Nov.25, 2003), *perm. app. denied* (Tenn. May 10, 2004).

Bowman v. State, 206 S.W.3d 467, 472 (Tenn. Ct. App. 2006).

The first question that must be addressed is whether the principles established by our Supreme Court in *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891 (Tenn. 1996) apply to the State. In *McClung*, the Supreme Court announced the appropriate standard of care owed by owners and occupiers of business property to protect customers from criminal acts of third parties. Plaintiffs claim *McClung* applies to this case and the State should be held to the same standard as private business owners. Thus, according to Plaintiffs, the State can and should be held liable for criminal acts of third parties when those acts are reasonably foreseeable and the other requirements set forth in *McClung* and Tenn. Code Ann. § 9-8-307(a)(1)(C) are met.

The State argues that *McClung* does not apply to it and, therefore, the State cannot be held responsible for the criminal acts of third parties, such as Gann. Taking that one step further, the State argues that because *McClung* does not apply to it, there was no "negligently created or maintained dangerous condition on state-controlled real property" and, accordingly, the Claims Commission does not have jurisdiction pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(C) in which to proceed with this lawsuit. The State further argues:

> Here Claimants alleged in their Claim that Ms. Smith was "… brutally attacked and left for dead …." There was no allegation that any State controlled real property (*i.e.*, the allegedly poor lighting, undergrowth, [etc.,] … was dangerous in and of itself, but for the intervening criminal acts of a third party.

We must examine the opinion in *McClung* as well as relevant statutory provisions before we can determine if *McClung* applies to the State. The plaintiff in *McClung* was the husband of Dorothy McClung, who was kidnapped at the Delta Square Shopping Center in Memphis. After being kidnapped, Ms. McClung was raped and murdered. *McClung*, 937 S.W.2d at 893, 894. At issue was the appropriate standard of care owed by owners and occupiers of business property. The Court provided a thorough discussion of the evolution of the standard of care owed by business owners before holding:

After careful consideration of the jurisprudence of other jurisdictions and our own, we adopt the following principles to be used in determining the duty of care owed by the owners and occupiers of business premises to customers to protect them against the criminal acts of third parties: A business ordinarily has no duty to protect customers from the criminal acts of third parties which occur on its premises. The business is not to be regarded as the insurer of the safety of its customers, and it has no absolute duty to implement security measures for the protection of its customers. However, a duty to take reasonable steps to protect customers arises if the business knows, or has reason to know, either from what has been or should have been observed or from past experience, that criminal acts against its customers on its premises are reasonably foreseeable, either generally or at some particular time.

In determining the duty that exists, the foreseeability of harm and the gravity of harm must be balanced against the commensurate burden imposed on the business to protect against that harm. In cases in which there is a high degree of foreseeability of harm and the probable harm is great, the burden imposed upon defendant may be substantial. Alternatively, in cases in which a lesser degree of foreseeability is present or the potential harm is slight, less onerous burdens may be imposed. By way of illustration, using surveillance cameras, posting signs, installing improved lighting or fencing, or removing or trimming shrubbery might, in some instances, be cost effective and yet greatly reduce the risk to customers. *See Seibert v. Vic Regnier Builders, Inc.*, 856 P.2d at 1339-40. In short, "the degree of foreseeability needed to establish a duty decreases in proportion to the magnitude of the foreseeable harm" and the burden upon defendant to engage in alternative conduct. *Pittman v. Upjohn Co.*, 890 S.W.2d at 433 (Tenn. 1994). "As the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution." *Prosser & Keeton on the Law of Torts* at 171. The degree of foreseeability needed to establish a duty of reasonable care is, therefore, determined by considering both the magnitude of the burden to defendant in complying with the duty and magnitude of the foreseeable harm.

As a practical matter, the requisite degree of foreseeability essential to establish a duty to protect against criminal acts will almost always require that prior instances of crime have occurred on or in the immediate vicinity of defendant's premises. Courts must consider the location, nature, and extent of previous criminal

> activities and their similarity, proximity, or other relationship to the crime giving rise to the cause of action. To hold otherwise would impose an undue burden upon merchants.

Id. at 901, 902 (footnote omitted).

In resolving whether the principles set forth in *McClung* apply to the State, we are mindful that the "State of Tennessee, as a sovereign, is immune from suit except as it consents to be sued." *Stewart v. State*, 33 S.W.3d 785, 790 (Tenn. 2000)(quoting *Brewington v. Brewington*, 215 Tenn. 475, 480, 387 S.W.2d 777, 779 (1965)). This general rule, however, has been modified by Article 1, Section 17 of the Tennessee Constitution which provides that "[s]uits may be brought against the State in such manner and in such courts as the Legislature may by law direct." *Stewart*, 33 S.W.3d at 790. Pursuant to this constitutional provision, the General Assembly in 1984 created the Tennessee Claims Commission to hear certain types of claims against the state. *Id*. As observed in *Stewart*:

> While the Claims Commission has exclusive jurisdiction to hear claims arising against the state, *cf*. Tenn. Code Ann. § 20-13-102(a) (1994), this jurisdiction is limited only to those claims specified in Tennessee Code Annotated section 9-8-307(a). If a claim falls outside of the categories specified in section 9-8-307(a), then the state retains its immunity from suit, and a claimant may not seek relief from the state. *Cf. Hill v. Beeler*, 199 Tenn. 325, 329, 286 S.W.2d 868, 869 (1956) (stating that "except as the Legislature of the State consents there is no jurisdiction in this Board of Claims to entertain suits against the State").

Stewart, 33 S.W.3d at 790 (footnote omitted).

The *Stewart* Court further discussed an important rule of statutory construction for claims brought against the state pursuant to Tenn. Code Ann. § 9-8-307(a). Ordinarily, when interpreting statutes granting jurisdiction to hear claims against the state, any such jurisdictional statute must be given a strict construction because it is in derogation of the common law. *Stewart*, 33 S.W.3d at 790. This particular rule of statutory construction, however, does not apply to claims brought pursuant to Tenn. Code Ann. § 9-8-307(a). As the *Stewart* Court explained:

> [I]n 1985, the General Assembly amended section 9-8-307(a) to express its intention as to the jurisdictional reach of the Claims Commission: "It is the intent of the general assembly that the jurisdiction of the claims commission be liberally construed to implement the remedial purposes of this legislation." Tenn. Code Ann. § 9-8-307(a)(3).

> Hence, although we have traditionally given a strict construction to the scope of the Commission's jurisdiction, we also recognize that our primary goal in interpreting statutes is "to ascertain and give effect to the intention and purpose of the legislature." *Gleaves v. Checker Cab Transit Corp., Inc.*, 15 S.W.3d 799, 802 (Tenn. 2000) (citing *Carson Creek Vacation Resorts, Inc. v. State Dep't of Revenue,* 865 S.W.2d 1, 2 (Tenn. 1993)). If the legislature intends that its statutes waiving sovereign immunity are to "be liberally construed," then the courts should generally defer to this expressed intention in cases where the statutory language legitimately admits of various interpretations. A policy of liberal construction of statutes, however, only requires this Court to give "the most favorable view in support of the petitioner's claim," *Brady v. Reed*, 186 Tenn. 556, 563, 212 S.W.2d 378, 381 (1948), and such a policy "does not authorize the amendment, alteration or extension of its provisions beyond [the statute's] obvious meaning." *Pollard v. Knox County*, 886 S.W.2d 759, 760 (Tenn. 1994). Moreover, "[w]here a right of action is dependent upon the provisions of a statute ... we are not privileged to create such a right under the guise of a liberal interpretation of it." *Hamby v. McDaniel*, 559 S.W.2d 774, 777 (Tenn. 1977).
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> Accordingly, when deciding whether a claim is within the proper statutory scope of the Commission's jurisdiction to hear and decide claims against the State of Tennessee, we will give a liberal construction in favor of jurisdiction, but only so long as (1) the particular grant of jurisdiction is ambiguous and admits of several constructions, and (2) the "most favorable view in support of the petitioner's claim" is not clearly contrary to the statutory language used by the General Assembly. *Cf. Northland Ins. Co. v. State*, 33 S.W.3d 727, 730 (Tenn. 2000) ("The statute's liberal construction mandate allows courts to more broadly and expansively interpret the concepts and provisions within its text."). Furthermore, because issues of statutory construction are questions of law, *see Wakefield v. Crawley*, 6 S.W.3d 442, 445 (Tenn. 1999); *Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593, 599 (Tenn. 1999), we review the issues involving the jurisdiction of the Claims Commission *de novo* without any presumption that the legal determinations of the commissioner were correct. *See Northland Ins. Co.*, 33 S.W.3d at 729; *Ardis Mobile Home Park v. State*, 910 S.W.2d 863, 865 (Tenn. Ct. App. 1995).

Stewart, 33 S.W.3d at 791

Returning to the present case, Plaintiffs assert jurisdiction pursuant to Tenn. Code Ann § 9-8-307(a)(1)(C) (Supp. 2007). This statute provides as follows:

> **9-8-307. Jurisdiction - Claims - Waiver of actions - Standard for tort liability - Damages - Immunities - Definitions - Transfer of Claims. -** (a)(1) The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of "state employees," as defined in § 8-42-101(3), falling within one (1) or more of the following categories:
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> * * *
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> (C) Negligently created or maintained dangerous conditions on state controlled real property. The claimant under this subdivision (a)(1)(C) must establish the foreseeability of the risks and notice given to the proper state officials at a time sufficiently prior to the injury for the state to have taken appropriate measures ….

Prior to the Supreme Court's opinion in *McClung*, this Court had the opportunity to construe Tenn. Code Ann. § 9-8-307(a)(1)(C) in *Morgan v. State*, No. M2002-02496-COA-R3-CV, 2004 WL 170352 (Tenn. Ct. App. Jan. 27, 2004), *no appl. perm appeal filed*. In *Morgan* we observed:

> The State is not the insurer of the safety of persons on its property. *Byrd v. State*, 905 S.W.2d 195, 197 (Tenn. Ct. App. 1995). It is, however, liable to these persons to the same extent that private owners and occupiers of land are liable, *Sanders v. State*, 783 S.W.2d 948, 951 (Tenn. Ct. App. 1989), because Tenn. Code Ann. § 9-8-307(a)(1)(C) has imposed this common-law duty on the State. *Parent v. State*, 991 S.W.2d at 242. Tenn. Code Ann. § 9-8-307(a)(1)(C) provides that the State may be held monetarily liable for
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> > Negligently created or maintained dangerous conditions on state controlled real property. The claimant under this subsection must establish the foreseeability of the risks and notice given to the proper state officials at a time sufficiently prior to the injury for the state to have taken appropriate measures.

> Based on this statute, the State, like a private landowner, has a duty to exercise reasonable care under the circumstances to prevent foreseeable injuries to persons on the premises. *Eaton v. McLain*, 891 S.W.2d at 593-94. This duty is grounded on the foreseeability of the risk involved. To recover, a claimant must prove that the injury was a reasonably foreseeable probability. *Dobson v. State*, 23 S.W.3d 324, 331 (Tenn. Ct. App. 1999).

Morgan, 2004 WL 170352, at * 6. *See also Bowman v. State*, 206 S.W.3d 467, 473 (Tenn. Ct. App. 2006)("Based on Tenn. Code Ann. § 9-8-307(a)(1)(C), the State, like any private property owner, has the duty to use reasonable care to protect persons on its property from unreasonable risks of harm. . . . This duty includes maintaining the premises in a reasonably safe condition either by removing or repairing potentially dangerous conditions or by helping persons avoid injury by warning them of conditions that cannot, as a practical matter, be removed or repaired." (citations omitted)).

In the present case, the State claims that Tenn. Code Ann. § 9-8-307(a)(1)(C) is not applicable for two reasons. First, the dangerous condition Plaintiffs complain of (inadequate lighting) was not dangerous in and of itself. Second, there is no liability because a third party, Gann, used the property for a criminal use that was not intended. We disagree with both assertions. As set forth in *Morgan*, pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(C), the state is liable "to the same extent that private owners and occupiers of land are liable." *Morgan*, 2004 WL 170352, at * 6. And, "like any private property owner, [the State] has the duty to use reasonable care to protect persons on its property from unreasonable risks of harm." *Bowman*, 206 S.W.3d at 473. This brings us squarely back to *McClung*, where the Supreme Court determined when a business owner or occupier can be held liable for the foreseeable criminal acts of a third party. We see no reason under the statute and case law why the state should be held to a different standard than private business owners. Such a result would be contrary to the General Assembly's stated intent found in Tenn. Code Ann. § 9-8-301(c) and the general purpose behind § 9-8-307(a)(1)(C).

In light of the foregoing, we conclude that the principles announced in *McClung* are indeed applicable to the State and these principles will, therefore, be considered when determining whether the Claims Commission has jurisdiction pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(C). We further agree with and adopt the following statement from the Commission's majority opinion wherein the Commission concluded that *McClung* applied to the State:

> In this day and age educational institutions, both public and private, are significant business enterprises. Activities involving instruction, intellectual training, basic research in various fields, and popular sporting events take place on university and college campuses all over the State of Tennessee. This is certainly true of the University of Tennessee at Knoxville. Given the fact that UTK plays such a vital role in the life of not only Knox County, Tennessee, but also the State

> of Tennessee, we believe that the *McClung* analysis can and should be fairly applied to the State, through the University, in this case.…

Having determined that *McClung* is applicable to the State, the next question is whether the specific provisions of Tenn. Code Ann. § 9-8-307(a)(1)(C) have been complied with. Plaintiffs must show: (1) that there was a negligently created or maintained dangerous condition on state controlled real property; (2) the risk was foreseeable; and (3) that notice was given to the proper state officials at a time sufficiently prior to the injury for the state to have taken appropriate measures. We will address each of these issues in turn.

There was considerable evidence offered at trial surrounding the quality of the lighting at the site of the attack on Ms. Smith. As one might expect, the testimony was contradictory. Several students and relatives of Ms. Smith testified that the lighting was dim and/or inadequate. Several witnesses for the State testified that the lights at the site of the attack were working properly and the place where Ms. Smith initially was attacked was well lit. The majority en banc decision stated that "[o]ur independent review of the lighting conditions convinces us, as it did Commissioner Cheek, that there was a real problem with the lighting at the site of the attack on Jessica Smith …."

After a thorough review of the record, we conclude that the evidence does not preponderate against the en banc Commission's findings and resulting decision affirming Commissioner Cheek's findings that the lighting at the site of the attack was inadequate for the reasons stated by Commissioner Cheek as set forth previously in this opinion, and that this constituted a negligently created or maintained dangerous condition on state controlled real property.

The next issue is whether the attack on Ms. Smith was foreseeable and, if so, whether that foreseeability was sufficient to establish a duty on the part of the State. When analyzing this issue, we must keep in mind that the foreseeability and gravity of the harm must be balanced against the commensurate burden imposed upon the business, here the State, in order to protect from that harm. We return to *McClung* for the following discussion on foreseeability and duty:

> As a practical matter, the requisite degree of foreseeability essential to establish a duty to protect against criminal acts will almost always require that prior instances of crime have occurred on or in the immediate vicinity of defendant's premises. Courts must consider the location, nature, and extent of previous criminal activities and their similarity, proximity, or other relationship to the crime giving rise to the cause of action. To hold otherwise would impose an undue burden upon merchants.
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> Considering the number, frequency, and nature of the crimes reported to police, management's acknowledgment of security

> problems, and other evidence in the record, we conclude that the proof would support a finding that the risk of injury to plaintiff's wife was reasonably foreseeable. Of course, foreseeability alone does not establish the existence of a duty. On remand, the magnitude of the potential harm and the burden imposed upon defendants must also be weighed to determine the existence of a duty.
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> In weighing the magnitude of harm and the burden imposed upon defendant, the court must consider whether imposing a duty to take reasonable measures to protect patrons from the consequences of criminal acts of third persons would place an onerous burden - economic or otherwise - upon defendants. If it does not, then the court must consider whether the burden outweighs the foreseeability and gravity of the possible harm, so as to preclude the finding of a duty to take reasonable steps to protect patrons. We hasten to point out, however, that the question of duty and of whether defendants have breached that duty by taking or not taking certain actions is one for the jury to determine based upon proof presented at trial. Additionally, if properly raised as a defense, under our doctrine of comparative fault, a plaintiff's duty to exercise reasonable care for her own safety would be weighed in the balance. *Perez v. McConkey*, 872 S.W.2d 897 (Tenn. 1994).

McClung, 937 S.W.2d at 902, 904.

There was testimony at trial concerning crimes that were committed within a 100-yard area of the Parking Garage. Plaintiffs called John A. Harris ("Harris") as an expert witness.[5] Harris owns a company called The Harris Group located in Atlanta Georgia. His company does "security consulting and expert testimony in matters such as these." In preparation for his testimony, Harris reviewed discovery responses, layouts of the campus, written material from various agencies, depositions, and crime statistics. Harris also visited the campus and the Parking Garage and walked the path from the Parking Garage to the steps where Ms. Smith was attacked.

[5] For the sake of brevity, we will not detail Harris' credentials. We do note, however, that at the trial the State objected to Harris' qualifications and was permitted to conduct a voir dire examination into Harris' qualifications. The Commissioner determined that Harris was qualified as an expert, and that determination is not challenged on appeal.

When questioned about criminal activity in the Parking Garage itself as well as within 100 yards of the garage[6], Harris stated:

> A. In the year 2000 – and it's my understanding that was the first year of operation of the Lake Avenue Garage – there were three burglaries of motor vehicles. In 2001 there were about 18, I believe. And then the following year there were 16 theft offenses, in 2000 none, in 2001 four, and in 2002 seven. In the year 2000 there were two thefts from vehicles, in the year 2001 none, in the year 2002 none.
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> In the year 2000 there was a theft of a motor vehicle. In the year 2001 there was a theft of a motor vehicle. In the year 2002 there were two thefts of motor vehicles.
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> In 2000 there was a vandalism offense, and in 2001 there were 12, and in 2002 there were 11. In the year 2000 there were no alcohol offenses. In the year 2001 there were nine. In the year 2002 there were [10 alcohol offenses].
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> Q. Did you also cover criminal activity within 100 yards of the garage? …
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> A. These numbers start back in 1999 and go forward through the year 2002. In the year 1999 there were 14 alcohol-drug offenses. In the year 2000 there were 12 alcohol-drug offenses. And in the year 2001 there were 17. In the year 2002 there were 15.[7]

In addition to the foregoing, several witnesses, including members of the University's Police Department, acknowledged that parking garages in general tend to attract more crime.

In summarizing the proof offered at trial as it related to crime in the area of the Parking Garage and where Ms. Smith was attacked, the Commission's majority opinion states as follows:

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[6] There was considerable disagreement at trial concerning the proper geographical area to consider when ascertaining the amount of crime in the "immediate vicinity." *See McClung*, *supra*, at 902. Commissioner Cheek concluded that it was appropriate to consider the entire University campus. The en banc majority of the Commission specifically rejected that finding, concluding they should only consider "crimes in the Lake Avenue Parking Garage and within one hundred (100) yards of the Garage." We agree with this finding by the Commission majority.

[7] The Commission noted that the University's expert documented a greater number of crimes in the Parking Garage than did Mr. Harris.

The Claimants have established that the Lake Avenue Parking Garage had become a magnet for individuals attracted to the area for the express purpose of either stealing vehicles or breaking into them and stealing their contents. As indicated earlier … Dr. Calder, expert witness for the Defendant, actually documented more theft events (55) than did Mr. Harris (45) in the years 2001 and 2002 following the garage's opening in 2000.

These numbers, over a brief period of time, are sobering. Even Detective McReynolds admitted that there was a problem with car burglaries in both the Lake Avenue Parking Garage and in other garages on the campus. We believe that Dean Brown correctly believed, as he testified to, that garages such as Lake Avenue were at a greater risk for theft than garages found more to the interior of the campus.

Lake Avenue runs immediately to the North of the Garage. Exhibit 63 is a compendium in two (2) volumes of an alarming variety of either criminal acts or other very disturbing behavior carried out by person[s] who frequently had no connection with UTK or reason to be on or around its campus. Criminal acts taking place in the Garage included the actual theft of vehicles, burglary of vehicles … , vandalism involving vehicles and the building itself, and driving under the influence while in the Garage. In one episode, UTK police even prevented a transient from committing suicide by jumping from the top level of the garage. Several individuals were warned that if found again on campus without proper accompaniment or authorization, they would be charged with criminal trespass.

Perhaps the most disturbing incident from these exhibits took place on Lake Avenue behind the Garage on October 24, 2002, twenty (20) days before the attack on Jessica Smith, when a car loaded with stolen items was confiscated from three individuals who, while waiting in a squad car, were heard to say over the vehicle's audio system that they hoped the police did not find their concealed hand-gun. After that statement, the officers did find a gun and ammunition. These thieves were apprehended as they were looting a UTK student's automobile.

The crime in the Garage, as documented through the statistical analyses of Dr. Calder and Mr. Harris, and the police records contained in Exhibit 63 make it clear that the Lake Avenue Parking Garage and its immediate vicinity experienced a sufficient number of

> aberrant events in 2001 and 2002 to put the University on notice that something as violent as what happened to Jessica Smith could well happen there.

When considering the location, nature, and extent of the crimes in the immediate vicinity of the Parking Garage and the site where Ms. Smith was attacked in an attempt to steal her car, we do not find that the evidence preponderates against the Commission's finding and conclusion that the attack on Ms. Smith was foreseeable. However, as noted by the Court in *McClung*, "foreseeability alone does not establish the existence of a duty." *McClung*, 937 S.W.2d at 904. Once it is determined that the harm was foreseeable, "the magnitude of the potential harm and the burden imposed upon defendants must also be weighed to determine the existence of a duty." *Id*.

We conclude that the magnitude of foreseeability and potential harm to students in the immediate vicinity of the Parking Garage was relatively high, and the burden imposed on the University must correspond accordingly. The Court in *McClung* noted that, in some instances, there may be cost effective means to reduce the potential harm. For example, "using surveillance cameras, posting signs, installing improved lighting or fencing, or removing or trimming shrubbery might, in some instances, be cost effective and yet greatly reduce the risk …." *Id*. at 902. The present case is a good example of how some cost effective measures taken by the University could have reduced the potential threat to its students. Among other things, the University could have "installed improved lighting" to help reduce the risk. This is not to suggest that the University is under an obligation to light up the entire campus, and our decision should not be taken as such. However, we do conclude that it was foreseeable that Ms. Smith or any student in the immediate vicinity of the Parking Garage could be the victim of a crime at the hands of a third party. The University, therefore, had a duty to take further steps to reduce the threat of harm, and the University failed to do so in this case.

The next issue is whether the State was provided adequate notice. Relying on *Sanders v. State*, 783 S.W.2d 948 (Tenn. Ct. App. 1989), the Commission concluded that because the State actually maintained the light at issue, the "University clearly must be charged with actual notice of the lighting conditions there." In *Sanders*, this Court succinctly stated that because "the state constructed the offending instrumentality and obviously must be charged with notice of its condition as constructed." *Id*. at 952. We reached the same result in *Hamby v. State*, W2002-00928-COA-R3-CV, 2002 WL 31749450 (Tenn. Ct. App. Dec. 4, 2002). At issue in *Hamby* was an allegedly defective aluminum grate covering on the U.T. Memphis campus which collapsed when the plaintiff was standing on it. One of the issues was whether the University had adequate notice under Tenn. Code Ann. § 9-8-307(a)(1)(C). The commissioner concluded that the state did not have adequate notice, distinguishing our previous holding in *Sanders*. On appeal, we reversed that determination stating:

> We find that this case is not distinguishable from *Sanders* on the issue of notice. In *Sanders*, we said that, "In the case at bar, the state constructed the offending instrumentality and obviously must be

> charged with notice of its condition as constructed." 783 S.W.2d 948, 952 (Tenn. Ct. App. 1989). *See also McGaughy v. City of Memphis*, 823 S.W.2d 209, 214-15 (Tenn. Ct. App. 1991). According to the testimony in this case, the grating was part of the original construction of the Dunn Dental Building. Before this accident, the grating had remained unchanged in the twenty (20) to twenty-five (25) years since the building was completed. Testimony indicated that the grating was there to keep debris out of the pit and to protect anyone from falling into it. Although the grating succeeded in keeping debris from the machinery below, it was woefully inadequate for its other function of keeping people from falling into the pit. Because we find that the state or its agent(s) created the offending instrumentality when it constructed the Dunn Dental Building, we must charge them with notice under the first prong of *Jones v. Zayre, Inc.*[8]

Hamby, 2002 WL 31749450, at *6 (footnote added). In light of *Hamby* and *Sanders*, because the State in the present case was responsible for constructing and maintaining the light at issue, we conclude that Plaintiffs established that the State had adequate notice pursuant to Tenn. Code Ann. § 9-8-307(a)(1)(C). This result is consistent with the overall liberal construction to be given to the jurisdictional grant to the Claims Commission, as well as the General Assembly's stated intent in Tenn. Code Ann. §9-8-301(c)("The determination of the state's liability in tort shall be based on the traditional tort concepts of duty and the reasonably prudent persons' standard of care.").

There are five essential elements which are necessary to establish a negligence claim. These elements are: "(1) a duty of care owed by defendant to plaintiff; (2) conduct falling below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal, cause." *McClung*, 937 S.W.2d at 894. We have already determined that the State owed a duty of care to Ms. Smith. We also have concluded that the University's conduct amounted to a breach of that duty, satisfying the second element in a negligence case. *Id*. There is no doubt that Ms. Smith suffered an injury or loss, and the third element is easily established.

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[8] In *Jones v. Zayre, Inc.*, 600 S.W.2d 730, 732 (Tenn. Ct. App. 1980), this Court stated:

> Before an owner or operator of premises can be held liable for negligence in allowing a dangerous or defective condition to exist on its premise, it must have (1) been created by the owner or operator or his agent or, (2) if the condition was created by someone other than the owner or operator or his agent, there must be actual or constructive notice on the part of the owner of operator that the condition existed prior to the accident. *Gargaro v. Kroger Grocery & Baking Co.*, 22 Tenn. App. 70, 118 S.W.2d 561 (1938).

The fourth and fifth elements of a negligence claim involve whether a plaintiff has established cause in fact and proximate cause. Once again, *McClung* offers guidance:

> Finally, we must address defendants' argument that random criminal acts of unknown third persons amount to superseding, intervening causes for which defendants cannot be held liable as a matter of law. It is true, as pointed out by defendants, that a superseding, intervening cause can break the chain of causation. In this regard, we have stated that
>
> > [t]here is no requirement that a cause, to be regarded as the proximate cause of an injury, be the sole cause, the last act, or the one nearest to the injury, provided it is a substantial factor in producing the end result. An intervening act, which is a normal response created by negligence, is not a superseding, intervening cause so as to relieve the original wrongdoer of liability, provided the intervening act could have reasonably been foreseen and the conduct was a substantial factor in bringing about the harm.
>
> *Haynes v. Hamilton County*, 883 S.W.2d 606, 612 (Tenn. 1994) (quoting *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991)). Proximate cause, as well as the existence of a superseding, intervening cause, are jury questions unless the uncontroverted facts and inferences to be drawn from the facts make it so clear that all reasonable persons must agree on the proper outcome. *Haynes v. Hamilton County*, 883 S.W.2d at 612; *Cook v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 940 (Tenn.1994); *McClenahan v. Cooley*, 806 S.W.2d at 775-76.

McClung, 937 S.W.2d at 905.

At the trial in this case, Plaintiff's expert witness, Harris, testified that had the University taken additional safety precautions, including "better lighting," then it was more likely than not that the crime against Ms. Smith would have been prevented. The State cites us to no proof in the record, nor could we find any, that the inadequate lighting as found by the Commission was not "a substantial factor in producing the end result." *Id*. In light of Harris' testimony, as well as the inferences to be drawn from the facts of this case, the evidence does not preponderate against the Commission's finding of causation. We, therefore, cannot conclude that the Commission erred when it determined that Plaintiffs had satisfied the last two elements of their negligence claim.

The only remaining issue raised by the State is its claim that the Commission erred when it denied its motions to dismiss and/or for summary judgment. When a trial court denies a motion for summary judgment, that ruling is not reviewable following the entry of a judgment on the merits. *See Corley v. Metro. Gov't. of Nashville and Davidson County*, No. M2004-02851-COA-R3-CV, 2006 WL 845999, at *3 (Tenn. Ct. App. Mar. 31, 2006), *no appl. perm. appeal filed* ("When the trial court denies a motion for summary judgment upon the finding of a genuine issue as to a material fact, that ruling is not reviewable when there has been a judgment rendered after a trial on the merits."); *accord Barrett v. Vann*, No. E2006-01283-COA-R3-CV, 2007 WL 2438025 (Tenn. Ct. App. Aug. 29, 2007), *no appl. perm appeal filed*.

The only issue raised by Plaintiffs involves the Commission's determination that a confession by Gann was inadmissible. Given our resolution of the preceding issues, this last and final issue is pretermitted.

Conclusion

The en banc majority decision of the Claims Commission is affirmed and this cause is remanded to the Claims Commission for collection of the costs below. The costs on appeal are taxed to the Appellant, the University of Tennessee.

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D. MICHAEL SWINEY, JUDGE